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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

No. 723

CITY OF LOS ANGELES (a municipal corporation), DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY (a corporation).

CITY OF LOS ANGELES (a municipal corporation), DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY (a corporation).

REPLY TO PETITION FOR A REHEARING.

KENNETH FERGUSON,
FRANCIS R. KIRKHAM,
JESS G. SUTLIFF,
Counsel for Respondent.

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REPLY TO PETITION FOR A REHEARING.

The only new contention advanced by petitioners is that the decision of the California Supreme Court for the first time imported a federal question into the case, so that the raising of the question after such decision was

timely. The argument is that the decision imposes upon petitioners the obligation to acquire flowage rights in lands on the Mojave Desert and in the channel of the Santa Clara River and to waste surplus water on that desert and in that channel. This ruling is said to deprive petitioners of property without due process of law, contrary to the Fourteenth Amendment to the federal Constitution.

There are several answers:

(1) No such decision was rendered.

(2) Even if the court had so held, the petition for rehearing filed in the state court did not sufficiently raise any federal question in connection with any ruling in the case.[1]

(3) Even if the court had so held, and a denial of federal right had been properly claimed in the petition for rehearing, such a raising of the federal question after decision would not have been timely. The question as a matter of substance is not new. It was involved and discussed in various forms all through the case. For example, one of the "questions involved" on the appeal to the court below—as stated by petitioners in their opening brief[2]—was:

> "(3) Is appropriator obligated under Constitution, Art. XIV, Sec. 3, to *prevent* stream flow *not*

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[1]See the quotation at page 8 of Petitioners' Reply to Respondent's Statement in Opposition to Motion for Leave to Proceed, etc.

[2]See "Statement of Questions Involved," quoted at pp. 3-4 of Respondent's Reply to Petitioners' Reply on Motion for Leave to Proceed on Typewritten Transcript.

diverted (because *not needed*) from *discharging* into *saline lake?*"[3]

And the petition for rehearing (page 2, et seq.) points out other instances when the question was discussed. At any time petitioners could have claimed and asked the state courts to pass upon any federal rights they deemed to be theirs in connection with this question. Their only "surprise" was by the adverse ruling of the court—not by its decision of the question.

(4) Even if the federal question now urged by petitioners had been properly raised, the decision below would still rest upon an adequate non-federal ground. As we have pointed out, petitioners' argument is based on the assumption that the state court held that it must acquire flowage rights on the Mojave Desert and in the Santa Clara River for the diversion of surplus waters. If this were true, the California Supreme Court also held:[4]

> "While the flow of water was unusually large for a brief period, it would have been within the capacity of the aqueduct had it been stored temporarily in available space, and gradually released where it would do no harm."

BRIEF OF AMICUS CURIAE.

Consent to file this brief has not been obtained (see Rule 27, paragraph 9, of the Rules of this Court), but

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[3]And see question (1) in "Statement of Questions Involved," supra, note 2.

[4]Appendices to Petition for Writs of Certiorari, p. 5; also, 23 A.C., at p. 195.

we do not oppose its filing. The brief states that the questions involved in the case are important questions of water law. No showing is made that any federal question was raised in the state courts. The questions discussed in the brief are obviously questions of state law, notwithstanding their general characterization as matters of federal constitutional right.

CONCLUSION.

We respectfully submit that the petition for rehearing should be denied.

Dated, San Francisco, California,
April 17, 1944.

Respectfully submitted,
KENNETH FERGUSON,
FRANCIS R. KIRKHAM,
JESS G. SUTLIFF,
Counsel for Respondent